

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CV-05-1293 JC/DJS
CR-04-1101 JC

NESTOR DANIEL ORTEGA,

Defendant.

MEMORANDUM OPINION AND ORDER

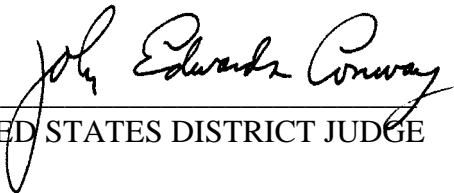
This matter comes before the Court on Defendant's emergency request for supplement and traverse (CIV Doc. 4; CR Doc. 55) filed March 6, 2006 (the "motion"). By order and judgment entered January 25, 2006, the Court dismissed Defendant's § 2255 motion. Because the instant motion was filed more than ten days after entry of judgment, the Court construes the motion as seeking relief from judgment under Fed. R. Civ. P. 60(b).

Defendant raises a new claim in his rule 60(b) motion. His sole claim in the original § 2255 motion is that his sentence is unreasonable under the decision in *United States v. Booker*, 543 U.S. 220 (2005). In his rule 60(b) motion, Defendant does not argue that *Booker* applies retroactively; he instead argues that his attorney provided ineffective assistance by failing to argue for a lower sentence under *Blakely v. Washington*, 542 U.S. 296 (2004). In a proceeding under § 2255, a rule 60(b) motion that raises a new issue is treated as a second or successive § 2255 motion. *Cf. Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (per curiam); *United States v. Washington*, No. 00-3210, 2001 WL 170481, at **2 (10th Cir. Feb. 21, 2001); *United States v. Bovie*, No. 01-1097,

2001 WL 863578, at **1 (10th Cir. July 31, 2001).

According to the provisions of § 2255, before a defendant may file or prosecute a second or successive motion, an order authorizing the filing must be issued by the appropriate court of appeals. This proceeding will be transferred to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1631. *See Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997).

IT IS THEREFORE ORDERED that the Clerk is directed to transfer this proceeding to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1631.



SENIOR UNITED STATES DISTRICT JUDGE